

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

000466

ST **KILGORE, IVAN** DEPT. **006** CRT. DATE/TIME **7/21/03 09:00**
 EVENT NAME **KILGORE, IVAN DAWNELL** RPT. NO. **00-64017** DOCK NO. **141033**
 I. PROC. **APCSL** CEN. **0373689** PFN. **BBV550** A DAY **11/01/00** SJ DATE **1/27/04**
COUNTS **PIC 00S00 AAG-OPD ACITY 0A**
 CHARGES **1)F187 SC&USE PC 1 PR CONVICTED-J**

STAT SET BAIL **\$0.00** TOTAL DAYS IN CUSTODY: **989**
 BAIL STAT. BOND DT. BOND CO. DOB **05/05/75**
 BAIL STAT. BOND DT. BOND CO. BAC
 FINE/REST. DATE PAID REC. NO. **NORTH 1** TIME WAIVED **TWS**

PROCEEDING

JUDGE **KENNETH KINGSBURY** DCCO:
 DEP. CLERK **WANDA BOYNS** DEP. D.A. **DARRYL STALLWORTH**
 REPORTER **GERALD DOHRMANN** DEF. ATTY. **DEBORAH LEVY** ☐ Not Present
 OTHERS **ATTY WALTER PYLE**

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
☐ Stipulates to: lesser included / reasonably related offense of count(s) to charge(s)
 Time waived for: ☐ Preliminary Examination days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
☐ Clauses: ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
☐ Priors: ☐ Stricken ☐ Admitted ☐ Denied
☐ Probation: ☐ Conditional Sentence: ☐ Granted for years/months ☐ See attached conditions
☐ Revoked ☐ Restored ☐ Modified ☐ Extended to ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control
☐ No contact with / not to annoy directly or indirectly: stay at least away
☐ Additional order(s):
☐ Petition/Motion ☐ Granted ☐ Denied ☐ Withdrawn
☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer
 Restitution: ☐ Referred to for Determination ☐ Ordered ☐ Reserved ☐ Modified
☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ ☐ No Cite Release ☐ Night Service

2X CERT-CRT: WWM

ATTY WALTER PYLE IS APPOINTED TO REPRESENT THE DEFT FOR
 THE PURPOSE OF FILING A MOTN FOR NEW TRIAL.
 ALL RECORDS OF PRIOR ATTY ARE RELEASED TO MR. PYLE

ont: Date: **8-15-03** Time: **0900** Dept. **06** Proc.: **NT** Date: Time: Dept. Proc.:
 S Codes:

DOCKET NAME **KILGORE, IVAN DAWNELL** CT. DATE **7/21/03** DOCK NO. **141033**



C00467

**Superior Court
State of California**

COUNTY OF ALAMEDA

CHAMBERS OF
KENNETH R. KINGSBURY
JUDGE1225 FALLON STREET
OAKLAND, CALIFORNIA 94612
(510) 272-6082
FAX (510) 271-5130**MEMORANDUM****FILED**
ALAMEDA COUNTY**DATE:** July 21, 2003

JUL 21 2003

TO: Gerald Dohrmann
Court Reporter, Department 6CLERK OF THE SUPERIOR COURT
By Wanda G. Rios
Clerk**FROM:** Kenneth R. Kingsbury, Judge - Department 6**SUBJECT:** Trial Transcript: People v. Kilgore No. 141033

As you are aware, the Court, following the necessary showing, recently granted the defendants' motion for separate appointed counsel to prepare and argue his motion for a new trial based on the allegation of ineffective assistance of this trial counsel during his earlier jury trial in this department. Although there was some difficulty in finding an attorney willing/able to accept the case, on July 21, 2003, Walter Pyle accepted appointment. The matter was then continued until August 15, 2003. Mr. Pyle indicated that he would require a trial transcript to review prior to the filing of the motion. He informed the Court that "Court Appointed" informed him that, based on a lack of funds and anticipated investigation costs, they would not be able to provide funds for the transcript – estimated to be approximately \$1500.

As a transcript will be necessary for proper preparation of the motion, this memorandum will serve to order preparation of the trial transcript in this matter with payment therefore to be made from the County Treasury pursuant to the provisions of Section 69952 (a)(1) of the Penal Code.

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CLERKS DOCKET AND MINUTES

000468

1. NAME KILGORE, IVAN DEPT. 006 CRT. DATE/TIME 8/15/03 09:002. NAME KILGORE, IVAN DAWNELL RPT. NO. 00-64017 DOCK NO. 1410333. PROC. MNT CEN. 0373689 PFN. BBV550 A DAY 11/01/00 SJ DATE 2/23/04
COUNTS PIC 00S00 AAG-OPD ACITY OA4. CHARGES 1)F187 SC&USE PC 1 PR CONVICTED-J

STAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1016

5. BAIL STAT. BOND DT. BOND CO. DOB 05/05/75
BAIL STAT. BOND DT. BOND CO. BAC
3. FINE/REST. DATE PAID REC. NO. NORTH 1 TIME WAIVED TWS

PROCEEDING

DCCD:

7. JUDGE KENNETH KINGSBURYDEP. D.A. DARRELL STALLWORTH3. DEP. CLERK WANDA BOYNSDEF. ATTY. DEBORAH LEVY WALTER PALE Not Present3. REPORTER GERALD DOHRMANN

OTHERS

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per

☐ Interpreter is present. Language spoken: _____

☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed

☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)

☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed

☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty

☐ Stipulates to: lesser included / reasonably related offense of count(s) to charge(s)

Time waived for: ☐ Preliminary Examination days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn

Clauses: ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only

☐ Priors: ☐ Stricken ☐ Admitted ☐ Denied

☐ Probation: ☐ Conditional Sentence: ☐ Granted for years/months ☐ See attached conditions

☐ Revoked ☐ Restored ☐ Modified ☐ Extended to ☐ Continue on same terms and conditions ☐ Terminated

☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation

☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control

☐ No contact with / not to annoy, directly or indirectly: stay at least away

☐ Additional order(s):

☐ Petition/Motion ☐ Granted ☐ Denied ☐ Withdrawn

☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer

Restitution: ☐ Referred to for Determination ☐ Ordered ☐ Reserved ☐ Modified

☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered

☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WWM

Print Date: 9-19-03 Time: 0900 Dept. 006 Proc.: MNT Date: Time: Dept. Proc.:

IS Codes:

DOCKET
NAMEKILGORE, IVAN DAWNELLCT. DATE 8/15/03 DOCK NO. 141033

000469
FILED
ALAMEDA COUNTY

NOV 14 2003

CLERK OF THE SUPERIOR COURT
By Hande J. Karam DEPUTY

1
2 Walter K. Pyle
3 (State Bar No. 98213)
4 2039 Shattuck Avenue, Suite 202
5 Berkeley, CA 94704
6 (510) 849-4424
7 Attorney for Defendant Ivan Kilgore

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IN THE
SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA

RENE C. DAVIDSON ALAMEDA COUNTY COURTHOUSE (NORTHERN DIVISION)

PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

v.

IVAN KILGORE,

Defendant.

No. 141033

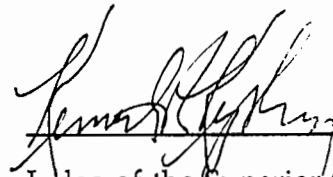
ORDER FOR COPY OF REPORTER'S
TRANSCRIPT OF TRIAL

TO COURT REPORTER, GERALD DOHRMAN:

IT IS HEREBY ORDERED that the court reporter prepare a copy of the following transcripts in the trial of Ivan Kilgore, to be paid by the County of Alameda, and to deliver it to Walter K. Pyle, attorney for Mr. Kilgore:

1. The ruling on defendant's motion to exclude priors convictions for impeachment purposes on March 14, 2003;
2. The discussions about jury instructions on March 17, 2003;
3. The discussions about jury instructions on March 18, 2003;
4. The closing arguments and final jury instructions on March 19, 2003.

Dated: 11/14/03


Judge of the Superior Court

RENE DAVIDSON COURTHOUSE

000470

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

DEPT. **KILGORE, IVAN** DEPT. **006** CRT. DATE/TIME **9/19/03 09:00**
 EVENT NAME **KILGORE, IVAN DAWNELL** RPT. NO. **00-64017** DOCK NO. **141033**
 PROC. **MNT** CEN. **0373689** PFN. **BBV550** A DAY **11/01/00** SJ DATE **3/29/04**
COUNTS PIC **00500** AAG-CPD ACITY **CA**
 CHARGES **1)F187 SC&USE PC 1 PR CONVICTED-J**

STAT SET **BAIL** \$0.00 TOTAL DAYS IN CUSTODY: **1051**
 BAIL STAT. BOND DT. BOND CO. DOB **05/05/75**
 BAIL STAT. BOND DT. BOND CO. BAC
 FINE/REST. DATE PAID REC. NO. **NORTH 1** TIME WAIVED **TWS**

PROCEEDING

DCCO:

JUDGE **KENNETH KINGSBURY** DEP. D.A. **DARVYL STALLWORTH**
 DEP. CLERK **WANDA BOYNS** DEF. ATTY. **DEBORAH LEVY** ☐ Not Present
 REPORTER **GERALD DOHRMANN ADRIENNE PERETTI** OTHERS

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter _____ is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) _____ ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
☐ Stipulates to: lesser included / reasonably related offense of count(s) _____ to charge(s) _____
 Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
 Clauses: ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
 Priors: ☐ Stricken ☐ Admitted ☐ Denied
 Probation: ☐ Conditional Sentence: ☐ Granted for _____ years/months ☐ See attached conditions
☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____
☐ No contact with / not to annoy _____, directly or indirectly: stay at least _____ away
☐ Additional order(s): _____
☐ Petition/Motion _____ ☐ Granted ☐ Denied ☐ Withdrawn
☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer ☐ _____
 Restitution: ☐ Referred to _____ for Determination ☐ Ordered ☐ Reserved ☐ Modified
☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WMM PAPERS TO BE FILED BY 11/7/03 BY CSL

FOR DEPT, IN WRITING.

ont: Date: **11-21-03** Time: **0900** Dept. **06** Proc.: **HRG** DATE **11/21/03** Date: _____ Time: _____ Dept. _____ Proc.: _____
 C 3 Codes: **MNT**

DOCKET NAME **KILGORE, IVAN DAWNELL** CT. DATE **9/19/03** DOCK NO. **141033**

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

000471

DEFENDANT **KILGORE, IVAN** DEPT. **006** CRT. DATE/TIME **11/21/03 09:00**
EVENT NAME **KILGORE, IVAN DAWNELL** RPT. NO. **00-64017** DOCK NO. **141033**
PROC. **MNT** CEN. **0373689** PFN. **BBV550** A DAY **11/01/00** SJ DATE **6/01/04**
COUNTS PIC **00S00** AAG-OPD ACITY **DA**
CHARGES **1)F187 SC&USE PC 1 PR CONVICTED-J**

STAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1114
BAIL STAT. BOND DT. BOND CO. DOB **05/05/75**
BAIL STAT. BOND DT. BOND CO. BAC
FINE/REST. DATE PAID REC. NO. **NORTH 1** TIME WAIVED **TWS**

PROCEEDING

DCCO:

JUDGE **KENNETH KINGSBURY** DEP. D.A. _____
DEP. CLERK **WANDA BOYNS** DEF. ATTY. **DEBORAH LEVY** ☒ Not Present
REPORTER **GERALD DOHRMANN** OTHERS _____

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter _____ is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) _____ ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
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Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
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☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____
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☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WMM

Print Date: **12-5-03** Time: **0900** Dept. **06** Proc.: **MNT** Date: _____ Time: _____ Dept. _____ Proc.: _____

Codes: _____

DOCKET NAME **KILGORE, IVAN DAWNELL** CT. DATE **11/21/03** DOCK NO. **141033**

000472

WALTER K. PYLE
SBN 98213
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

FILED
ALAMEDA COUNTY

NOV 24 2003

Attorney for Defendant Ivan Kilgore

CLERK OF THE SUPERIOR COURT

By Y. Landphong Deputy

IN THE

SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

IVAN KILGORE,

Defendant.

No. 141033

MOTION FOR NEW TRIAL
Dec. 5, 2003
9 a.m.
Dept. 6

Defendant IVAN KILGORE moves for a new trial in this case, on the grounds that he received ineffective assistance of counsel in his first trial.

This motion is based on this notice, the attached memorandum of points and authorities, the records and files in the case, and such further evidence and argument as may be presented at the hearing.

Defendant asks that he be allowed to call Attorney Levy to testify at a hearing on the motion, and that he be given the opportunity to testify in his own behalf.



Walter K. Pyle
Attorney for Defendant

000473

POINTS & AUTHORITIES

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POINTS & AUTHORITIES

I.

COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO PLAYING THE COMPLETE TAPE OF THE MATTHEW BRYANT INTERVIEW.

Matthew Bryant was called as a State's witness. (RT 229.) Bryant testified that he had been arrested and Sgt. Green told him he would let him (Bryant) go if he would help him out. (RT 234.) Bryant testified he gave Green information he had heard on the street about the shooting. (RT 234.)

In response to questions by the prosecutor, Bryant said he did not remember telling Sgt. Green that the defendant offered him \$500 to retrieve a shotgun on the balcony of the apartment (RT 236), did not remember telling Green that defendant said he was going to "smoke these dudes" who robbed him (RT 237), and did not remember defendant trying to get him to help make it look like his Cadillac had been broken into. (RT 237.) The prosecutor stated that those were the "gist" of the prosecutor's questions regarding the tape. (RT 237.)

The prosecutor then asked to play to the jury a tape recording of the interview with Sgt. Green. (RT 236, 237.) Counsel did not object.

The tape was hearsay, and there was no applicable hearsay exception making it admissible. It contained much prejudicial and incriminating material. (RT 259-274.) For example, on the tape Bryant said that defendant sold drugs. (RT 263.) Even more prejudicial, the tape related second-hand hearsay of what Jones had told Bryant about how defendant had said let's ride around, and he had taken a gun, and defendant shot someone. (RT 265.-266.)

There was no reason not to object to such evidence. Nor did counsel object when the prosecutor later asked Bryant *again* about Jones telling him that defendant shot someone from the back seat of the Cadillac. (RT 276.)

1
2 The tape was not admissible as a prior inconsistent statement (Evid. Code
3 § 1235), because all Bryant had said at that point was that he did not remember
4 making the statements to Green. Lack of recollection is not "inconsistent" with
5 another statement. (People v Sam (1969) 71 Cal.2d 194, 210.) Indeed, Bryant, after
6 hearing the tape outside the presence of the jury, readily conceded he told Green—
7 untruthfully—that the defendant told him he had shot someone. The tape was
8 *consistent* (RT 269) with this specific testimony. Bryant was never asked about the
9 "gist" of the other questions the prosecutor had in mind, so all that was left in the
10 record as to those questions was a failure of recollection, which is not inconsistent
11 with any statement.

12 Nor did the tape qualify as a prior *consistent* statement (Evid. Code §1236)
13 because Bryant had not made an inconsistent statement and the defendant had not
14 attacked Bryant's credibility. (See Evid. Code § 791.)

15 There is no reasonable reason for counsel not to object. In People v. Guizar
16 (1986) 180 Cal. App. 3d 487, trial counsel failed to take action to edit a statement
17 admitting in evidence against defendant so as to delete references to unproved
18 serious offenses that had little to do with the issues on trial. The court found it
19 inconceivable that counsel's failure to seek exclusion of the objectionable evidence was
20 a tactical decision, and reversed and remanded the case. (Id. at 492.)

21 Indeed, there were suggestions in Bryant's testimony that Sgt. Green had
22 coerced the statements on the tape. (RT 234.) Counsel should have sought a hearing
23 to disqualify the statements made to Green on due process grounds as well.

24 Counsel should also have interviewed Matthew Bryant before trial so she could
25 adequately prepare for cross-examination. The failure to interview witnesses cannot
26 be excused at trial strategy. (In re Hall (1981) 30 Cal.3d 408, 426 [relying on results of
27 police investigation was inexcusable delegation of attorney's duty].)
28

1 Thus there was no basis for not objecting to admission of the tape recording.
2 The evidence was highly prejudicial, and sufficient to have affected the outcome of the
3 trial, requiring the court to grant a new trial.
4

5 **II.**
6 **COUNSEL WAS INEFFECTIVE FOR NOT ASKING FOR A "403 HEARING" TO**
7 **PRESENT THE PRECISE TESTIMONY TO BE OFFERED BY DEFENDANT AT**
8 **TRIAL, SO THE COURT COULD MAKE AN INFORMED DETERMINATION OF**
9 **THE ACTUAL SIMILARITY OF THE OKLAHOMA EVIDENCE WITH THE CASE**
10 **AT BAR. COUNSEL SHOULD ALSO HAVE ASKED THE COURT TO WEIGH**
11 **THE PROBATIVE VALUE OF THE OKLAHOMA EVIDENCE AGAINST ITS**
12 **PREJUDICIAL EFFECT.**

13 The prosecution sought to use evidence of a prior event in Oklahoma which
14 resulted in a conviction of an offense which is the Oklahoma equivalent to the crime
15 of involuntary manslaughter in California. The prosecutor had a transcript of
16 defendant's testimony in the Oklahoma case.
17

18 The court asked the prosecutor to describe the purpose for which he sought to
19 introduce the evidence. (RT 3-14.-03, p. 5.) The prosecutor stated that he suspected
20 the defendant's explanation would be very "similar" in this case to the Oklahoma
21 explanation. (RT 3-14.-03, p. 8.) The prosecutor thought there might be testimony by
22 the defendant that the shooting in the case at bar was "spontaneous or was an
23 accident or was the heat of impulse." (RT 3-14.-03, p. 9.)
24

25 The proposed testimony of the defendant was discussed in general terms, but it
26 was not described in sufficient detail to allow the court to make an informed
27 determination whether the two incidents were as "similar" as the district attorney
28 thought they would be. Indeed, the district attorney noted that defense counsel's
moving papers said the defendant would say he thought Terry "would shoot," not
"Terry had shot,"¹ as defense counsel stated at the argument. (RT 3-14.-03, p. 28.)

26 ¹ Defendant contends that he had told defense counsel (as well as Mr. Traback,
27 his previous attorney) exactly, and in detail, what his testimony would be, but that his
28 counsel did not correctly set forth that information in her moving papers.

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2 The court itself expressed some irritation that the defendant's proffered testimony
3 kept fluctuating. (RT 3-14.-03, p. 29.)

4 In making a comparison of the similarity of the two events, it was important to
5 a proper ruling for the court to be advised of the exact nature of both the Oklahoma
6 testimony and the proposed testimony of defendant here.

7 Although the Oklahoma testimony was available, the court was told only in
8 general terms what defendant's testimony here would be. Defendant asserts that
9 defense counsel was ineffective, and should have requested a hearing pursuant to
10 Evidence Code section 403 [determination of preliminary fact] to allow defendant to
11 testify specifically as to what happened at 30th and San Pablo on the date of the
12 incident.

13 Counsel was also ineffective for not asking the court to weigh the probative
14 value of the evidence against its prejudicial effect once the court did not proceed to
15 engage in such a process. (Evid. Code §352.)

16 In People v. Simon (1986) 184 Cal.App.3d 125 the prosecution presented
17 evidence of a prior assault to negate the defendant's claim of self-defense. The Court
18 of Appeal explained that it was important to determine whether factually the two
19 incidents were *sufficiently similar* to negate the self-defense claim. (Id. at p. 130.) A
20 trial court must also weigh whether the probative value of the evidence outweighed
21 its prejudicial effect. (Id., at p. 129.) This determination likewise requires that the
22 court carefully scrutinize the testimony that the defendant proposes to give so the
23 State's proffered impeachment evidence can be weighed against it.

24 If the court, after hearing the proffered testimony (out of the presence of the
25 jury) determined that the evidence of the Oklahoma incident was sufficiently similar
26 that it was admissible, then the jury should also be given the opportunity to itself
27 factually evaluate the Oklahoma evidence. The jury should be instructed that unless it
28 determines, by a preponderance standard, that defendant's claim of self-defense in the

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2 Oklahoma case was bogus, it should disregard the evidence of the Oklahoma incident.
3 (See People v. Simon, supra 184 Cal.App.3d at 134; People v. Marshall (1996) 13
4 Cal.4th 799, 832.) However, the precise nature of defendant's proposed testimony
5 should be heard by the court so it can determine whether there is even sufficient
6 evidence to allow the other evidence to the jury.

7 Defendant's Fourteenth Amendment right to due process of law is also
8 implicated here. The use of "other acts" character evidence is contrary to firmly
9 established principles of Anglo-American jurisprudence, and has been since at
10 least 1684. (McKinney v. Rees (9th Cir. 1993) 993 F. 2d 1378, 1380.) Proof of an
11 act in the past often does prove motive, but instead may only prove a propensity
12 to commit crimes.

13 Proof of prior "bad acts" can be highly prejudicial, and the distinction
14 between proof of bad character (the type of a person who would commit this
15 crime) and proof of intent or motive is sometimes lost in the heat of trial, or even
16 simply overlooked. Past criminal activity very often proves no more than bad
17 character. (United States v. Masters (9th Cir. 1971) 450 F.2d 866, 867 [No
18 relationship between smoking marijuana and willingness to smuggle marijuana];
19 United States v. Mehrmanesh (9th Cir. 1982) 689 F.2d 822, 832 [same; prior drug
20 use not logical proof of drug importation, other than showing defendant's
21 general criminal propensity]; see also United States v. Webb (9th Cir. 1972) 406
22 F.2d 1353, 1353 [robbery prosecution; proof of prior robbery merely shows "that
23 Webb is a bad character, disposed to commit robbery."]; McKinney v. Rees,
24 supra 993 F.2d 1378, 1383, 1385 [proof of knife ownership proved only defendant
25 was the type of person who would own knife, an impermissible propensity
26 inference, hence no "permissible" inferences to be drawn, hence violation of due
27 process of law under Federal Constitution].)
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2 Once the court had indicated it intended to allow the Oklahoma evidence,
3 the court should have also weighed that prejudicial evidence to determine its
4 relative probative value. There does not appear to be any explanation for
5 counsel not asking the court to do so.

6 In the context of the evidence available to the court when it ruled that the
7 district attorney could use the Oklahoma evidence for impeachment, the
8 similarity of the two incidents was insufficient, and there were no permissible
9 inferences which the jury could have drawn from the Oklahoma evidence.
10 Counsel's failure to ask for a "403 hearing" and a "352 determination" violated
11 defendant's Sixth Amendment right to counsel and the Due Process Clause of the
12 Fourteenth Amendment.

13 **II.**
14 **COUNSEL WAS INEFFECTIVE IN HER CROSS-EXAMINATION OF THE**
15 **PROSECUTION WITNESSES.**

16 **A.**
17 **Testimony of Raymond Jones**

18 Defense counsel was ineffective in cross-examining Raymond Jones,
19 particularly in view of the fact that Jones had given many statements when
20 testifying at the preliminary hearing which could have been useful at trial.

21 For example, Jones had testified at the preliminary examination that he had
22 smoked some marijuana and that he was "pretty drunk" (RT 6-5-01, p. 1) at the time
23 of the shooting, and that his senses could have been dulled. (RT 6-5-01, p. 1.) At trial
24 he testified that he smoked marijuana (RT 205), had some beer (RT 206) and had
25 possibly snorted some heroin (RT 207, 209), but he nevertheless he did not consider
26 himself high by the time of the shooting (RT 215) and instead was "sober at that
27 point." (RT 216.) Counsel did not vigorously cross-examine Jones using his
28 contradictory testimony at the preliminary examination.

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1 At the preliminary examination Jones said that he and defendant had talked
2 about how to get the guys that robbed defendant off defendant's back, and they
3 talked about a confrontation and a "fair fight," but there had never been any talk of
4 shooting, and when they were leaving in the Cadillac that day the defendant had only
5 said "there was going to be a fight." (RT 6-5-01, p. 15.) At trial Jones only testified as
6 to *his* state of mind that Jones guessed defendant was going to go over and fight
7 those guys. (RT 157-158.) Counsel did not bring out that that was defendant's state of
8 mind, too.² In addition, Jones had testified at the preliminary examination that he did
9 not see a shotgun go into the car in his presence, and that "most likely the shotgun
10 was already in the car," i.e., the shotgun was in the car because defendant customarily
11 carried it there, not because he brought it with him that day for a drive-by shooting.
12 (RT 6-5-01, p. 13.) Counsel did not bring this out at trial, either.

13 Also, at the preliminary examination Jones acknowledged that initially when
14 the police asked, Jones told them defendant didn't say anything before the shooting.
15 (RT 6-5-01, p. 16.) At the trial when Jones said defendant said "What's up punk?" just
16 before the shooting, counsel did not bring out Jones prior contradictory statement to
17 the police. (RT 199.) Counsel should also have emphasized that Jones (according to
18 his preliminary examination testimony) told defendant not to do anything stupid like
19 shoot someone, and defendant agreed with that (RT 6-5-01, p. 16), while at trial she
20 only brought out that Jones told him not to do something stupid. (RT 224.)

21 Jones told Sgt. Green he didn't know who decided to have him drive the
22 defendant's car (Taped Statement to Sgt. Green, p. 7), but at trial he said the defendant
23 asked him to drive. (RT 159.)

24 These discrepancies in Jones' testimony suggested that Jones may have been
25 willing to slant his testimony in favor of the prosecution's case, but counsel did not
26 bring out the contrary evidence so the jury could evaluate it.

27 ² Indeed, counsel objected to Jones' testimony on the point. (RT 158.)
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2 Counsel also did not bring out that at the preliminary examination Jones
3 had, on Exhibit E, drawn a line showing an illegal turn going south on San Pablo,
4 but at trial he drew a legal turn going north on San Pablo, which conflict would
5 have reduced the perceived reliability of Jones' testimony.

6 Counsel should also have pointed out to the jury the lack of logic of Jones'
7 testimony that he was afraid of Terrance Dandy and bought a gun to protect
8 himself, but he only gave defendant a baseball bat to protect himself from the
9 same danger. Counsel should have also questioned how Jones could have seen
10 defendant drive away to the Home Depot, as he claimed, when he continued to
11 work inside the store, where a view was not possible. (RT 156.)

12 Counsel also did not examine Jones to bring out that (as he testified at the
13 preliminary examination) he was 15 feet away from the people on the sidewalk
14 when he made his U-turn. (RT 6-5-01, p. 5.) This would have contradicted
15 testimony by Shanea Anderson that the car pulled up to the curb (RT 69) and the
16 testimony by Bianca Moore that the car turned and pulled up "in front" of her.
(RT 333) where she was allegedly able to see defendant. (RT 334.)

17 Counsel should also have pointed out at trial that because Jones' case had
18 been continued to shortly after he was to testify at the preliminary examination
19 (RT 130), his testimony was "locked in" at that point and he could not thereafter
20 change his testimony without being charged with perjury.

21
22 **B.**

The Testimony of Jones at the "402 Hearing."

23 An informant had told police that Raymond Jones was driving the vehicle
24 involved in the shooting. (RT 110.) Police arrested him for the murder (RT 110), with
25 no probable cause (RT 135), and questioned him for several hours. (RT 119.) Initially
26 Jones denied any knowledge of the incident (RT 126), but when they told him he
27 could either be a defendant in a murder case or a witness, he thought maybe he ought
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1 to tell the police "something they want to hear" (RT 6-4-01, P. 101), and he gave a
2 statement exculpatory to him and inculpatory to defendant.

3 That statement, we submit, was clearly a coerced one. Coercion is not limited
4 to physical battery.

5 Jones was released from custody after he implicated defendant in his
6 statement. But about four months later he was re-arrested on a charge of being an
7 accessory after the fact.

8 Counsel should have countered Jones' testimony at the "402 hearing" with
9 inconsistencies in the preliminary examination transcript of his testimony.
10 Inconsistencies would tend to suggest that Jones was amenable to slant his testimony
11 to gain favor with the prosecution, that is, it was evidence of coercion.

12 The re-arrest of Jones only served to emphasize the power the police had over
13 Jones. The message was not lost on Jones. From feeling relieved when he had been
14 released the first time, Jones went to feeling betrayed when he was re-arrested. (RT
15 6-5-01, p. 17.) When he was released a few days later, he said at the preliminary
16 examination that he was in a pretty good mood to cooperate with the authorities so
17 he wouldn't get arrested a third time. (RT 6-5-01, p. 18.) His agreement with the
18 prosecutor (Exhibit 10) required him to testify at trial. All this was evidence of
19 coercion.

20 Defendant asserts that had counsel brought out Jones' statements as Jones had
21 testified at the preliminary examination, and emphasized to the court the that it is the
22 unreliable nature of coerced testimony that prevents its admission, Jones would not
23 have been allowed to testify at trial as to the matters he told the police. When Jones
24 was allowed to testify it violated defendant's Fourteenth Amendment right to due
25 process of law.

26 Counsel also did not request a jury instruction detailing the factors that when a
27 prosecution witness such as Jones, who had been arrested but had charges dropped
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2 and reduced with the understanding that he would cooperate as a witness, his
3 testimony should be viewed with caution because the arrangement provides a motive
4 to give false testimony.

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6 **C.
The Bianca Moore Testimony**

7 Bianca Moore admitted that she had given a false identity of Terry Dandy to the
8 police, so her credibility started out with at least some taint. Defense counsel, however,
9 was ineffective for not vigorously cross-examining Ms. Moore to bring out further
10 impeachment evidence.

11 Bianca Moore testified she saw the man with the gun. (RT 334.) Counsel started
12 to impeach Moore with her statement to the police that she only "thought it was Ivan
13 or one of his friends." (RT 355.) Moore said she did not recall that. (RT 335.) When
14 counsel showed the witness a statement signed by her, Moore said it was her signature
15 but she could not read the writing. (RT 336.) However, counsel did not pursue the
16 matter or call Officer Olivas, who took her statement, in order to complete the
17 impeachment. (See Olivas notes, bottom of p. 2.)

18 **IV.
TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE WHEN SHE DID NOT
19 OBJECT TO, AND ASK TO STRIKE, THE TESTIMONY, OF DR. HERRMANN'S
20 BALLISTICS OPINION.**

21 Dr. Herrmann, a forensic pathologist, was called as a witness for the prosecution.
22 The court found him to be "well-qualified to give an opinion about the cause of death."
(RT 41.)

23 Dr. Herrmann performed an autopsy on the deceased, William Anderson. (RT
24 42.) He found 11 penetrating shotgun pellet wounds and two exit wounds. (RT 42-43.)
25 The 11 penetrating wounds were in a fairly tight group, approximately two-and-a-half
26 inches in diameter. (RT 47, 51.) There was no evidence that any powder was
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1 embedded in the skin. (RT 47.) The significance of these findings is "quite variable,"
2 however, in the case of a shotgun. (RT 52.)

3 After answering the prosecutor's question what he noted about the pattern of
4 the 11 entry wounds, the doctor went on to state that he estimated that the weapon
5 was fired from between 5 and 12 feet away. On cross-examination Dr. Herrmann
6 stated that he has seen enough shotgun wounds to say that the distance from which the
7 weapon was fired was within his expertise. (RT 50.) The spread of the pellets also
8 depends on the choke of the gun, but there was no way Dr. Herrmann could tell
9 whether a choke was "used" or not. (RT 52-53.)

10 Defendant asserts that his counsel should have objected to the opinion as one
11 that Dr. Herrmann had not been qualified to give, and asked that the testimony be
12 stricken.

13 First, Dr. Herrmann demonstrated no training or expertise that would allow him
14 to testify about how much shotgun pellets "spread" in a given situation, particularly
15 when there was no information available about the shotgun that was involved.
16 Although he had been qualified to determine the cause of the death, there was no
17 showing that he had special knowledge, training or experience to qualify him as an
18 expert on ballistics or shotgun pellet patterns, let alone express an opinion relating to a
19 shotgun of unknown characteristics. (See Evid. Code § 720.)

20 The fact that Dr. Herrmann testified he had seen other shotgun wounds was
21 insufficient to establish his qualifications. (See People v. Fierro (1991) 1 Cal.4th 173, 224.)
22 [retired deputy could testify about ballistics, but not as to effect of autopsy procedures
23 on evidence of the bullets' trajectory.] Even if Dr. Herrmann had seen many, many
24 gunshot wounds, that fact would not have qualified him to express an opinion as to
25 how far away a gun was when it was fired, unless he had witnessed the shootings or
26 other ballistic tests themselves.³

27 ³ This is not a case where burns, smoke or powder on the skin were present.
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V.
DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE UNDER THE SIXTH
AMENDMENT.

A criminal defendant has a constitutional right to *effective* assistance of counsel. (People v. Ledesma (1987) 43 Cal. 3d 171 215.) To prevail on a claim of ineffective counsel, a defendant must show first, that counsel's representation fell below an objective standard of reasonableness (Strickland v. Washington (1984) 466 U.S. 668, 688), and second, that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (Id. at 694.)

Both prongs of the Strickland test have been met in this case.

It is trial counsel's duty to investigate all defenses of fact and law which may be available. (People v. Mattson (1959) 51 Cal. 2d 777, 791; People v. Pope (1979) 23 Cal. 3d at 425.) Counsel should advise his client of his rights and take all necessary actions to protect them. If counsel's failure to perform these obligations results in the withdrawal of a crucial defense, then defendant has not had the assistance to which he is entitled under the Sixth Amendment. (People v. Pope, supra 23 Cal. 3d 412, 425.)

The actions of counsel in the case at bar did not give the defendant the standard of performance to which he was entitled.

When trial counsel has a tactical consideration in mind which explains the failure to raise a crucial defense, his tactics, even if unsuccessful, will usually not be considered incompetence. (People v. Pope, supra 23 Cal. 3d at 425.) However, the record itself may dispel the notion that counsel's shortcoming was the result of a tactical decision. For example, in People v. Stratton (1988) 205 Cal. App. 3d 87, the court held that the face of the record established that it was unreasonable to suggest that "tactics" could explain or justify counsel's failure to object to the potentially prejudicial circumstances surrounding appellant's arrest (holding a dummy hand grenade) which had nothing to do with the robbery with which he was charged. (Id. at p. 93, 94.)

1 Except for the errors of counsel in this case, taken cumulatively, there was a
2 substantial probability that the result of the proceeding would have been different.
3 (Strickland v. Washington, *supra* 466 U.S. at 694 ; Kimmelman v. Morrison (1986) 477
4 U.S. 365, 375.)
5

6 CONCLUSION

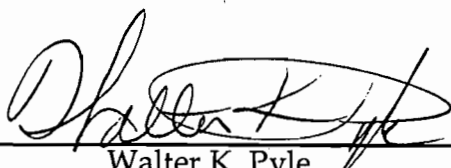
7 Mary Washington testified at trial to hearing several shots as they passed the
8 intersection (RT 531, 535.) Mary Loggins testified that after the shooting she saw
9 someone running down San Pablo, and his hands and arms were close to his body
10 like he may have had something under his jacket. (RT 514, 423.) This evidence was
11 consistent with the theory that Terry Dandy had a pistol and had fired it at defendant,
12 which would have supported a theory of self defense.

13 The record shows that defense counsel gave ineffective assistance by not
14 adequately investigating or preparing for a defense based on reasonable doubt. It is
15 clear from the nature of trial counsel's questions up until the court ruled at the end of
16 the State's case that defendant's prior testimony in his Oklahoma case could be
17 introduced to impeach him, that the defense theory was one of self-defense. (See, e.g.,
18 RT 194.) The record shows that counsel's ineffective assistance made a reasonable
19 doubt defense untenable under the circumstances. The decision to shift the defense to
20 that of reasonable doubt therefore could not have been an informed decision by
21 counsel.

22 Defendant asserts that counsel did not give him effective assistance, and there
23 is a substantial probability that affected the outcome of the case.

24 Defendant asks that this court grant him an opportunity to give testimony as
25 to the information he provided to counsel, and to examine counsel on similar matters.

26 At the close of the hearing the court should grant defendant's motion for a new
27 trial.

28 
Walter K. Pyle
Attorney for Defendant

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

000489

COMPLAINT KILGORE, IVAN DEPT. 006 CRT. DATE/TIME 12/05/03 09:00EVENT NAME KILGORE, IVAN DAWNELL RPT. NO. 00-64017 DOCK NO. 141033PROC. MNT CEN. 0373689 PFN. BBV550 A DAY 11/01/00 SJ DATE 6/14/04
COUNTS PIC 00S00 AAG-OPD ACITY DACHARGES 1)F187 SC&USE PC 1 PR CONVICTED-JSTAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1128
BAIL STAT. BOND DT. BOND CO. DOB 05/05/75
BAIL STAT. BOND DT. BOND CO. BAC
FINE/REST. DATE PAID REC. NO. NORTH 1 TIME WAIVED TWS

PROCEEDING

JUDGE KENNETH KINGSBURY DCCO:
DEP. CLERK WANDA BOYNS DEP. D.A. DARYL STALLWORTH
REPORTER GERALD DCHRMANN DEF. ATTY. DEBORAH LEVY WALTER RYLE ☐ Not Present
OTHERS

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter _____ is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) _____ ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
☐ Stipulates to: lesser included / reasonably related offense of count(s) _____ to charge(s) _____
 Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
 Causes: ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
☐ Priors: ☐ Stricken ☐ Admitted ☐ Denied
☐ Probation: ☐ Conditional Sentence: ☐ Granted for _____ years/months ☐ See attached conditions
☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____
☐ No contact with / not to annoy _____, directly or indirectly: stay at least _____ away
☐ Additional order(s): _____
☐ Petition/Motion _____ ☐ Granted ☐ Denied ☐ Withdrawn
☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer ☐ _____
 Restitution: ☐ Referred to _____ for Determination ☐ Ordered ☐ Reserved ☐ Modified
☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WWM

PAPERS TO BE FILED BY THE PROSECUTION BY 12/22/03.

ont: Date: 1-9-04 Time: 0900 Dept. 06 Proc.: MNT Date: _____ Time: _____ Dept. _____ Proc.: _____

C Codes: _____

DOCKET NAME KILGORE, IVAN DAWNELL CT. DATE 12/05/03 DOCK NO. 141033

000430

THOMAS J. ORLOFF
 District Attorney
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Hearing Date: January 9, 2004

FILED
 ALAMEDA COUNTY

JAN 5 - 2004

CLERK OF THE SUPERIOR COURT
 By Honda G. Brown DEPUTY

Darryl Stallworth (# 163719)
 Deputy District Attorney

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA**

THE PEOPLE OF THE STATE OF CALIFORNIA,)

v.)

IVAN KILGORE,)

Defendant.)

No. 141003

Department 6

**MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE
 TO DEFENDANT'S MOTION FOR A NEW TRIAL**

I.

Introduction

Defendant's Memorandum of Points and Authorities in Support of A Motion for a New Trial on grounds that he received ineffective assistance of counsel identifies four grounds as the basis for the motion. First, he alleges his counsel was ineffective for not objecting to the playing of Matthew Bryant's taped interview. Second, he alleges his counsel was ineffective for not tactically requesting a "403 hearing" regarding the use or non use of defendant's Oklahoma prior. Third, he alleges his counsel was ineffective because she did not vigorously cross examine Raymond Jones and Bianca Moore. Fourth, he alleges his counsel was ineffective for not objecting to Dr.

1 Herrmann's opinion testimony regarding how far the shooter may have been from the
2 victim.

3 The burden of proving a claim of ineffective assistance of counsel is on the
4 defendant. Defendant must first overcome the "strong presumption that counsel's
5 conduct falls within the wide range of reasonable professional assistance". (*Strickland*
6 *v. Washington* (1984) 466 U.S. 668,689; *People v. Makaba* (1993) 14 Cal.App.4th 847,
7 853; *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1341.) In addition, defendant
8 must demonstrate that it is reasonably probable a more favorable result would have
9 been obtained in the absence of counsel's failings. (*People v. Duncan* (1991) 53
10 Cal.3d 955, 966; *People v. Cox* (1991) 53 Cal.3d 618, 656.)
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15 1. Matthew Bryant's Taped Statement

16 Trial counsel was not ineffective for failing to object to the playing of Bryant's
17 taped statement. Evidence Code 1235 provides in effect that a prior inconsistent
18 statement of a witness is admissible not only to impeach his credibility but also to prove
19 the truth of the matters asserted. *People v. Green* (1971) 3 C.3d 981
20

21 At trial Bryant admitted that he did speak with Sgt. Green regarding defendant's
22 role in the murder that took place on July 16, ²⁰⁰⁰2001. In Bryant's taped statement he
23 admits to speaking with both Raymond Jones and defendant regarding the shooting.
24 Bryant also admits on tape, that he personally met with defendant after the shooting in
25 an attempt to retrieve the murder weapon and make the Cadillac, that was used in the
26 murder, appear to have been stolen. However, at trial Bryant insisted that he neither
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1 spoke to or met with defendant regarding the murder (RT Page 234, Lines 7-19). At
2 trial Bryant also insisted that he did not remember telling Sgt. Green in his taped
3 statement that he had spoke to or met with defendant (RT Page 236, Lines 17-28 Page
4 237, Lines 1-22). Bryant was then allowed to listen to his 15 minute taped statement
5 outside the presence of the jury.
6

7 After listening to his statement Bryant acknowledged that he did in fact make
8 statements to Sgt. Green regarding both speaking to and meeting with defendant.
9 Bryant however, added that those statements were untrue and the result of coercion and
10 threats by Sgt. Green (RT All of Pages 254 & 255). The people then proceeded to
11 properly impeach Bryant with his taped statement, but only after trial counsel properly
12 requested the court first admonish the jury. (RT Pages 257 & 258). The playing of the
13 taped made it clear that there was nothing on the tape that suggested in the slightest
14 that Bryant's statements to Sgt. Green were the result of force or threats. Bryant's trial
15 testimony concluded with him repeatedly stating that he did not remember much of what
16 he told Sgt. Green(RT Pages 274 through 286).
17
18
19

20 A more favorable result would not have been obtained had trial counsel objected
21 to the playing of Bryant's taped statement. Bryant's taped statement was clearly
22 admissible as a prior inconsistent statement. All of the proper foundations were met.
23 Bryant was given an opportunity to explain or deny his prior statements or lack of
24 recollection. Prior statements may be either inconsistent with some express testimony
25 or inconsistent with some implied testimony. Inconsistency in effect, rather than
26 contradiction in express terms, is the test for admitting a witness' prior statement
27
28

1 (*Firbreboard Paper Products Corp. v. East bay Union of Machinists* (1964) 227
2 Cal.App2d 675, 699[39 Cal.Rptr. 64]), and the same principle governs the case of the
3 forgetful witness. It was clear at trial that Bryant was not suffering from amnesia, but
4 rather was being purposely evasive. An objection by counsel would have been futile.
5 Trial counsel's choice to request that the court admonish the jury under Evidence Code
6 355 before playing the tape was more than adequate.
7

8 Defendant's argument that Bryant's references in his taped statement to what
9 Raymond Jones told him amounting to second-hand hearsay is without merit. Raymond
10 Jones testified before Bryant. What Jones told Bryant comes in as a prior consistent
11 statement of Jones. As to Bryant's reference that defendant sold drugs, this fact was
12 alluded to by numerous witnesses before and after Bryant testified, thus there was no
13 prejudice to defendant.
14
15

16
17 2. 403 Hearing
18

19 Trial Counsel was not ineffective for failing to ask for a "403 hearing" in order to
20 reveal defendant's proposed testimony. On the contrary, it would have been both
21 negligent and foolish to expose her clients defense in such a manner. What is most
22 important to make note of on this issue is that the Oklahoma prior was not used in the
23 People's case in chief. The people conceded that we would not have sought to
24 impeach the defendant with the prior in the form of a felony conviction. Our sole
25 purpose for seeking any reference to the Oklahoma case would have been as a result
26 of defendant having testified to behavior or thoughts which would make Evidence Code
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1 1101(b) applicable (RT 3-14-3 1-30). The people took great lengths to assure the court
2 that references to the Oklahoma cases would take place only after having laid the
3 proper foundations and giving the court an opportunity to rule beforehand.
4

5 Essentially what defendant is suggesting is that trial counsel should have given
6 the court a different, or more detailed description of what defendant might have testified
7 to at trial. A more favorable result would not have been obtained if this were done.
8 Even if defendant were himself allowed to describe his potential testimony in a "403
9 hearing" the court would not and could be prevented from reviewing the issue again
10 after having heard defendant's testimony in front of the jury.
11

12 The same rational exists regarding the court making a ruling under an Evidence
13 Code 352 analysis. Defendant's testimony in a "403 hearing" would only give the court
14 an idea of what he might say. It would have been impossible for the court to know
15 whether or not defendant's version of what happen would have held up on cross
16 examination.
17

18 An informed tactical judgment which results in the withdrawal of a potentially
19 meritorious defense does not constitute incompetence. (*In re Ibarra* (1983) 34 Cal.3d
20 277, 284.) That defendant might have desired some different action by his counsel is
21 irrelevant. "There is no constitutional right to an attorney who will conduct the defense
22 of the case in accordance with an indigent defendant's whims." (*People v. Jones*
23 (1971) 16 Cal.App.3d 837, 844.) Trial Counsel has over 20 years worth of trial
24 experience. Her tactical decisions regarding these issues were both appropriate and
25 reasonable.
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3. Cross Examination of Prosecution Witnesses

Defendant suggests that in some areas Raymond Jones and Bianca Moore's trial testimony differed from that of their preliminary hearing testimony and or prior statements. Defendant then concludes that trial counsel was ineffective for not having more vigorously cross examined these two witnesses. For example, defendant points out that Raymond Jones described himself as being pretty drunk before the shooting at the preliminary hearing, while at trial Jones states he did not consider himself high. At trial, counsel cross examined Jones over and over in this area (RT Pages 206-209). Defendant goes on to point out similar inconsistencies in the rest of Jones trial testimony, which are also more than adequately covered by his attorney.

Cross examination is by far the most challenging trial task to perform and also the most difficult to critique. It is not sufficient to allege merely that the attorney's tactics were poor or that the case might have been handled more effectively. (*People v. Lanphear* (1980) 26 Cal.3d 814, 828.) "Even the most competent counsel may from time-to-time make decisions or conduct himself in a manner which might be criticized by other equally competent counsel but that is not the measure of competency of counsel on review by an appellate court." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 485.)

The court, contrary to defendants moving papers, did in fact give the jury a number of concluding instructions regarding Jones' testimony.(See CALJIC 2.23, 3.10, 3.11, 3.12, 3.14, and 3.18) A more favorable result would not have been obtained had

1 trial counsel cross examined Bianca Moore and Raymond Jones more vigorously. For
2 all we know, additional cross examination could have been more detrimental to
3 defendant.
4

5
6 4. Dr. Herrmann's Ballistic Opinion

7 There is absolutely no merit to defendant's claim that trial counsel was ineffective
8 for failing to object to Dr. Herrmann giving his opinion on how far the shooter may have
9 been from the victim. Dr. Herrmann has been a Forensic Pathologist for over 25 years.
10 He has examined thousands of people who have suffered from shotgun wounds. Trial
11 counsel is an experience attorney. She knows that Pathologists such as Dr. Herrmann
12 have routinely been qualified to give opinions regarding distance as it relates to the
13 spread shotgun pellets. An objection by trial would have been useless. Had an
14 objection been made it would have been overruled.
15

This is not
on original (see)

16
17 Even if the court had sustained an objection by trial counsel a more favorable
18 result could not have been obtained because Shanae Anderson, Raymond Jones, and
19 Bianca Moore all testified in effect that defendant was somewhere between 5 to 12 feet
20 away from the victim when he fired the shotgun.
21

22 In conclusion, reviewing courts should avoid second-guessing counsel's informed
23 choice among tactical alternatives. (*People v. Pope, supra*, 23 Cal.3d at p. 424; *People*
24 *v. Lanphear, supra*, 26 Cal.3d at p.828.) "In evaluating defendant's showing we accord
25 great deference to the tactical decisions of trial counsel in order to avoid 'second-
26 guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to
27 defend himself against a claim of ineffective assistance after trial rather than to defend
28

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his client against criminal charges at trial." ' " (*In re Fields* (1990) 51 Cal.3d 1063,
1069-170.)

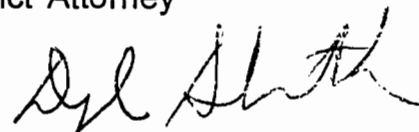
For all the reasons mentioned above, defendant's motion for a new trial should
be denied.

Dated: January 5, 2004

Respectfully submitted,

THOMAS J. ORLOFF
District Attorney

By:



Darryl Stallworth
Deputy District Attorney

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ENDORSED
FILED
ALAMEDA COUNTY

NOV 24 2003

CLERK OF THE SUPERIOR COURT
By Yolanda Phuong, Deputy

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IN THE
SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

IVAN KILGORE,

Defendant.

No. 141033

MOTION FOR NEW TRIAL
Dec. 5, 2003
9 a.m.
Dept. 6

Defendant IVAN KILGORE moves for a new trial in this case, on the grounds that he received ineffective assistance of counsel in his first trial.

This motion is based on this notice, the attached memorandum of points and authorities, the records and files in the case, and such further evidence and argument as may be presented at the hearing.

Defendant asks that he be allowed to call Attorney Levy to testify at a hearing on the motion, and that he be given the opportunity to testify in his own behalf.



Walter K. Pyle
Attorney for Defendant

① ② to object to
changing of pleadings and ③ to
request M2 instruction for
drive-by. ④ ⑤ to highlight
the D.A. must prove ⑥
meant to kill vs GBI.
⑦ refused to agree two objects
of retaliation.

POINTS & AUTHORITIES

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(A) entered into evid pictures of car that where altered due to the changing of tint. (A) (F) to investigate into this issue, and presented evid that enhanced the jurors ability to come to a conclusion that the tint was light enough to see through or would not obstruct a wit/s ability to percieve.

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(A) opened door to A felony status in
direct-exam of KT.

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POINTS & AUTHORITIES

I.
COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO PLAYING THE
COMPLETE TAPE OF THE MATTHEW BRYANT INTERVIEW.

Matthew Bryant was called as a State's witness. (RT 229.) Bryant testified that he had been arrested and Sgt. Green told him he would let him (Bryant) go if he would help him out. (RT 234.) Bryant testified he gave Green information he had heard on the street about the shooting. (RT 234.)

In response to questions by the prosecutor, Bryant said he did not remember telling Sgt. Green that the defendant offered him \$500 to retrieve a shotgun on the balcony of the apartment (RT 236), did not remember telling Green that defendant said he was going to "smoke these dudes" who robbed him (RT 237), and did not remember defendant trying to get him to help make it look like his Cadillac had been broken into. (RT 237.) The prosecutor stated that those were the "gist" of the prosecutor's questions regarding the tape. (RT 237.)

The prosecutor then asked to play to the jury a tape recording of the interview with Sgt. Green. (RT 236, 237.) Counsel did not object.

The tape was hearsay, and there was no applicable hearsay exception making it admissible. It contained much prejudicial and incriminating material. (RT 259-274.) For example, on the tape Bryant said that defendant sold drugs. (RT 263.) Even more prejudicial, the tape related second-hand hearsay of what Jones had told Bryant about how defendant had said let's ride around, and he had taken a gun, and defendant shot someone. (RT 265.-266.) *Also it presented to the jury that A had wks before shooting expressed a desire to kill (D), this evid. was*

There was no reason not to object to such evidence. Nor did counsel object when the prosecutor later asked Bryant *again* about Jones telling him that defendant shot someone from the back seat of the Cadillac. (RT 276.)

*not presented in any of
the other prosecutions
1 wity or evid.*

1
2 The tape was not admissible as a prior inconsistent statement (Evid. Code
3 § 1235), because all Bryant had said at that point was that he did not remember
4 making the statements to Green. Lack of recollection is not "inconsistent" with
5 another statement. (People v Sam (1969) 71 Cal.2d 194, 210.) Indeed, Bryant, after
6 hearing the tape outside the presence of the jury, readily conceded he told Green—
7 untruthfully—that the defendant told him he had shot someone. The tape was
8 *consistent* (RT 269) with this specific testimony. Bryant was never asked about the
9 "gist" of the other questions the prosecutor had in mind, so all that was left in the
10 record as to those questions was a failure of recollection, which is not inconsistent
11 with any statement.

12 Nor did the tape qualify as a prior *consistent* statement (Evid. Code §1236)
13 because Bryant had not made an inconsistent statement and the defendant had not
14 attacked Bryant's credibility. (See Evid. Code § 791.)

15 There is no reasonable reason for counsel not to object. In People v. Guizar
16 (1986) 180 Cal. App. 3d 487, trial counsel failed to take action to edit a statement
17 admitting in evidence against defendant so as to delete references to unproved
18 serious offenses that had little to do with the issues on trial. The court found it
19 inconceivable that counsel's failure to seek exclusion of the objectionable evidence was
20 a tactical decision, and reversed and remanded the case. (Id. at 492.)

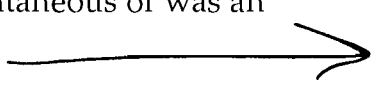
21 Indeed, there were suggestions in Bryant's testimony that Sgt. Green had
22 coerced the statements on the tape. (RT 234.) Counsel should have sought a hearing
23 to disqualify the statements made to Green on due process grounds as well.

24 Counsel should also have interviewed Matthew Bryant before trial so she could
25 adequately prepare for cross-examination. The failure to interview witnesses cannot
26 be excused at trial strategy. (In re Hall (1981) 30 Cal.3d 408, 426 [relying on results of
27 police investigation was inexcusable delegation of attorney's duty].)
28

1 Thus there was no basis for not objecting to admission of the tape recording.
 2 The evidence was highly prejudicial, and sufficient to have affected the outcome of the
 3 trial, requiring the court to grant a new trial.
 4

5 **II.**
 6 **COUNSEL WAS INEFFECTIVE FOR NOT ASKING FOR A "403 HEARING" TO**
 7 **PRESENT THE PRECISE TESTIMONY TO BE OFFERED BY DEFENDANT AT**
 8 **TRIAL, SO THE COURT COULD MAKE AN INFORMED DETERMINATION OF**
 9 **THE ACTUAL SIMILARITY OF THE OKLAHOMA EVIDENCE WITH THE CASE**
 10 **AT BAR. COUNSEL SHOULD ALSO HAVE ASKED THE COURT TO WEIGH**
 11 **THE PROBATIVE VALUE OF THE OKLAHOMA EVIDENCE AGAINST ITS**
 12 **PREJUDICIAL EFFECT.**

13 The prosecution sought to use evidence of a prior event in Oklahoma which
 14 resulted in a conviction of an offense which is the Oklahoma equivalent to the crime
 15 of involuntary manslaughter in California. The prosecutor had a transcript of
 16 defendant's testimony in the Oklahoma case.
 17

18 The court asked the prosecutor to describe the purpose for which he sought to
 19 introduce the evidence. (RT 3-14.-03, p. 5.) The prosecutor stated that he suspected
 20 the defendant's explanation would be very "similar" in this case to the Oklahoma
 21 explanation. (RT 3-14.-03, p. 8.) The prosecutor thought there might be testimony by
 22 the defendant that the shooting in the case at bar was "spontaneous or was an
 23 accident or was the heat of impulse." (RT 3-14.-03, p. 9.) 

24 The proposed testimony of the defendant was discussed in general terms, but it
 25 was not described in sufficient detail to allow the court to make an informed
 26 determination whether the two incidents were as "similar" as the district attorney
 27 thought they would be. Indeed, the district attorney noted that defense counsel's
 28 moving papers said the defendant would say he thought Terry "would shoot," not
 "Terry had shot,"¹ as defense counsel stated at the argument. (RT 3-14.-03, p. 28.)



¹ Defendant contends that he had told defense counsel (as well as Mr. Traback, his previous attorney) exactly, and in detail, what his testimony would be, but that his counsel did not correctly set forth that information in her moving papers.

1 The court itself expressed some irritation that the defendant's proffered testimony
2 kept fluctuating. (RT 3-14.-03, p. 29.)

3
4 In making a comparison of the similarity of the two events, it was important to
5 a proper ruling for the court to be advised of the exact nature of both the Oklahoma
6 testimony and the proposed testimony of defendant here.

7 Although the Oklahoma testimony was available, the court was told only in
8 general terms what defendant's testimony here would be. Defendant asserts that
9 defense counsel was ineffective, and should have requested a hearing pursuant to
10 Evidence Code section 403 [determination of preliminary fact] to allow defendant to
11 testify specifically as to what happened at 30th and San Pablo on the date of the
12 incident.

13 Counsel was also ineffective for not asking the court to weigh the probative
14 value of the evidence against its prejudicial effect once the court did not proceed to
15 engage in such a process. (Evid. Code §352.)

16  In People v. Simon (1986) 184 Cal.App.3d 125 the prosecution presented 
17 evidence of a prior assault to negate the defendant's claim of self-defense. The Court
18 of Appeal explained that it was important to determine whether factually the two
19 incidents were *sufficiently similar* to negate the self-defense claim. (*Id.* at p. 130.) A
20 trial court must also weigh whether the probative value of the evidence outweighed
21 its prejudicial effect. (*Id.*, at p. 129.) This determination likewise requires that the
22 court carefully scrutinize the testimony that the defendant proposes to give so the
23 State's proffered impeachment evidence can be weighed against it.

24 If the court, after hearing the proffered testimony (out of the presence of the
25 jury) determined that the evidence of the Oklahoma incident was sufficiently similar
26 that it was admissible, then the jury should also be given the opportunity to itself
27 factually evaluate the Oklahoma evidence. The jury should be instructed that unless it
28 determines, by a preponderance standard, that defendant's claim of self-defense in the

Oklahoma case was bogus, it should disregard the evidence of the Oklahoma incident. (See People v. Simon, supra 184 Cal.App.3d at 134; People v. Marshall (1996) 13 Cal.4th 799, 832.) However, the precise nature of defendant's proposed testimony should be heard by the court so it can determine whether there is even sufficient evidence to allow the other evidence to the jury.

Defendant's Fourteenth Amendment right to due process of law is also implicated here. The use of "other acts" character evidence is contrary to firmly established principles of Anglo-American jurisprudence, and has been since at least 1684. (McKinney v. Rees (9th Cir. 1993) 993 F. 2d 1378, 1380.) Proof of an act in the past often does prove motive, but instead may only prove a propensity to commit crimes.

Proof of prior "bad acts" can be highly prejudicial, and the distinction between proof of bad character (the type of a person who would commit this crime) and proof of intent or motive is sometimes lost in the heat of trial, or even simply overlooked. Past criminal activity very often proves no more than bad character. (United States v. Masters (9th Cir. 1971) 450 F.2d 866, 867 [No relationship between smoking marijuana and willingness to smuggle marijuana]; United States v. Mehrmanesh (9th Cir. 1982) 689 F.2d 822, 832 [same; prior drug use not logical proof of drug importation, other than showing defendant's general criminal propensity]; see also United States v. Webb (9th Cir. 1972) 406 F.2d 1353, 1353 [robbery prosecution; proof of prior robbery merely shows "that Webb is a bad character, disposed to commit robbery."]; McKinney v. Rees, supra 993 F.2d 1378, 1383, 1385 [proof of knife ownership proved only defendant was the type of person who would own knife, an impermissible propensity inference, hence no "permissible" inferences to be drawn, hence violation of due process of law under Federal Constitution].)

Once the court had indicated it intended to allow the Oklahoma evidence, the court should have also weighed that prejudicial evidence to determine its relative probative value. There does not appear to be any explanation for counsel not asking the court to do so.

In the context of the evidence available to the court when it ruled that the district attorney could use the Oklahoma evidence for impeachment, the similarity of the two incidents was insufficient, and there were no permissible inferences which the jury could have drawn from the Oklahoma evidence. Counsel's failure to ask for a "403 hearing" and a "352 determination" violated defendant's Sixth Amendment right to counsel and the Due Process Clause of the Fourteenth Amendment.

II. COUNSEL WAS INEFFECTIVE IN HER CROSS-EXAMINATION OF THE PROSECUTION WITNESSES.

A. Testimony of Raymond Jones

Defense counsel was ineffective in cross-examining Raymond Jones, particularly in view of the fact that Jones had given many statements when testifying at the preliminary hearing which could have been useful at trial.

For example, Jones had testified at the preliminary examination that he had smoked some marijuana and that he was "pretty drunk" (RT 6-5-01, p. 1) at the time of the shooting, and that his senses could have been dulled. (RT 6-5-01, p. 1.) At trial he testified that he smoked marijuana (RT 205), had some beer (RT 206) and had possibly snorted some heroin (RT 207, 209), but he nevertheless he did not consider himself high by the time of the shooting (RT 215) and instead was "sober at that point." (RT 216.) Counsel did not vigorously cross-examine Jones using his contradictory testimony at the preliminary examination.

(A) (F) to request Motion for New Trial
dope find instructions or elicit or present testimony
of / from expert pertaining to the reliance on the
effect of drugs on a witnesses ability to perceive and →

2 At the preliminary examination Jones said that he and defendant had talked
 3 about how to get the guys that robbed defendant off defendant's back, and they
 4 talked about a confrontation and a "fair fight," but there had never been any talk of
 5 shooting, and when they were leaving in the Cadillac that day the defendant had only
 6 said "there was going to be a fight." (RT 6-5-01, p. 15.) At trial Jones only testified as
 7 to *his* state of mind that Jones guessed defendant was going to go over and fight
 8 those guys. (RT 157-158.) Counsel did not bring out that that was defendant's state of
 9 mind, too.² In addition, Jones had testified at the preliminary examination that he did
 10 not see a shotgun go into the car in his presence, and that "most likely the shotgun
 11 was already in the car," i.e., the shotgun was in the car because defendant customarily
 12 carried it there, not because he brought it with him that day for a drive-by shooting.
 13 (RT 6-5-01, p. 13.) Counsel did not bring this out at trial, either.

14 Also, at the preliminary examination Jones acknowledged that initially when
 15 the police asked, Jones told them defendant didn't say anything before the shooting.
 16 (RT 6-5-01, p. 16.) At the trial when Jones said defendant said "What's up punk?" just
 17 before the shooting, counsel did not bring out Jones prior contradictory statement to
 18 the police. (RT 199.) Counsel should also have emphasized that Jones (according to
 19 his preliminary examination testimony) told defendant not to do anything stupid like
 20 shoot someone, and defendant agreed with that (RT 6-5-01, p. 16), while at trial she
 21 only brought out that Jones told him not to do something stupid. (RT 224.)

22 Jones told Sgt. Green he didn't know who decided to have him drive the
 23 defendant's car (Taped Statement to Sgt. Green, p. 7), but at trial he said the defendant
 24 asked him to drive. (RT 159.)

25 These discrepancies in Jones' testimony suggested that Jones may have been
 26 willing to slant his testimony in favor of the prosecution's case, but counsel did not
 27 bring out the contrary evidence so the jury could evaluate it.

28 ² Indeed, counsel objected to Jones' testimony on the point. (RT 158.)

PX CE. PG 15
 lines 11-22

Counsel also did not bring out that at the preliminary examination Jones had, on Exhibit E, drawn a line showing an illegal turn going south on San Pablo, but at trial he drew a legal turn going north on San Pablo, which conflict would have reduced the perceived reliability of Jones' testimony.

Counsel should also have pointed out to the jury the lack of logic of Jones' testimony that he was afraid of Terrance Dandy and bought a gun to protect himself, but he only gave defendant a baseball bat to protect himself from the same danger. Counsel should have also questioned how Jones could have seen defendant drive away to the Home Depot, as he claimed, when he continued to work inside the store, where a view was not possible. (RT 156.)

Counsel also did not examine Jones to bring out that (as he testified at the preliminary examination) ^{21 or more} he was 15 feet away from the people on the sidewalk when he made his U-turn. (RT 6-5-01, p. 5.) This would have contradicted testimony by Shanea Anderson that the car pulled up to the curb (RT 69) and the testimony by Bianca Moore that the car turned and pulled up "in front" of her. (RT 333) where she was allegedly able to see defendant. (RT 334.)

Counsel should also have pointed out at trial that because Jones' case had been continued to shortly after he was to testify at the preliminary examination (RT 130), his testimony was "locked in" at that point and he could not thereafter change his testimony without being charged with perjury.

B.

The Testimony of Jones at the "402 Hearing."

An informant had told police that Raymond Jones was driving the vehicle involved in the shooting. (RT 110.) Police arrested him for the murder (RT 110), with no probable cause (RT 135), and questioned him for several hours. (RT 119.) Initially Jones denied any knowledge of the incident (RT 126), but when they told him he could either be a defendant in a murder case or a witness, he thought maybe he ought

(A)(F) to CE. Mary W., M. Hoggan & subpoena Dorothy Irvin. Or inquire of them about this

to tell the police "something they want to hear" (RT 6-4-01, P. 101), and he gave a statement exculpatory to him and inculpatory to defendant.

That statement, we submit, was clearly a coerced one. Coercion is not limited to physical battery.

Jones was released from custody after he implicated defendant in his statement. But about four months later he was re-arrested on a charge of being an accessory after the fact.

Counsel should have countered Jones' testimony at the "402 hearing" with inconsistencies in the preliminary examination transcript of his testimony. Inconsistencies would tend to suggest that Jones was amenable to slant his testimony to gain favor with the prosecution, that is, it was evidence of coercion.

The re-arrest of Jones only served to emphasize the power the police had over Jones. The message was not lost on Jones. From feeling relieved when he had been released the first time, Jones went to feeling betrayed when he was re-arrested. (RT 6-5-01, p. 17.) When he was released a few days later, he said at the preliminary examination that he was in a pretty good mood to cooperate with the authorities so he wouldn't get arrested a third time. (RT 6-5-01, p. 18.) His agreement with the prosecutor (Exhibit 10) required him to testify at trial. All this was evidence of coercion.

And/ RJ testimony at PX¹⁰ were he said he wanted his testimony to be something the DA would be satisfied w/ so he wouldn't have to do any more time.

Defendant asserts that had counsel brought out Jones' statements as Jones had testified at the preliminary examination, and emphasized to the court that it is the unreliable nature of coerced testimony that prevents its admission, Jones would not have been allowed to testify at trial as to the matters he told the police. When Jones was allowed to testify it violated defendant's Fourteenth Amendment right to due process of law.

Counsel also did not request a jury instruction detailing the factors that when a prosecution witness such as Jones, who had been arrested but had charges dropped

In support of Δ argument that (A) (E) to elicit relevant issues pertaining to RJ's voluntariness and free will in making the decision to Motion for New Trial cooperate attenuated from the initial coercion of illegal arrest, (A) (E) to impeach or elicit PX testimony (pg 101) whereas RJ expressed that →

AJ expressed his dislike in having to be compelled by his ~~best~~ circumstances to have to be a witness against Δ at PX.

testimony should be viewed with caution because the arrangement provides a motive to give false testimony.

C. The Bianca Moore Testimony

Bianca Moore admitted that she had given a false identity of Terry Dandy to the police, so her credibility started out with at least some taint. Defense counsel, however, was ineffective for not vigorously cross-examining Ms. Moore to bring out further impeachment evidence.

Bianca Moore testified she saw the man with the gun. (RT 334.) Counsel started to impeach Moore with her statement to the police that she only "thought it was Ivan or one of his friends." (RT 355.) Moore said she did not recall that. (RT 335.) When counsel showed the witness a statement signed by her, Moore said it was her signature but she could not read the writing. (RT 336.) However, counsel did not pursue the matter or call ^{Off. Grivado} Officer Olivas, who took her statement, in order to complete the

impeachment. (See Olivas notes, bottom of p. 2.) *The issue w/ Olivas is in his notes the statements BM gave about what her belief was based on a similar car; this was additional impeach evid.*

TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE WHEN SHE DID NOT OBJECT TO, AND ASK TO STRIKE, THE TESTIMONY, OF DR. HERRMANN'S BALLISTICS OPINION.

Dr. Herrmann, a forensic pathologist, was called as a witness for the prosecution. The court found him to be "well-qualified to give an opinion about the cause of death." (RT 41.)

Dr. Herrmann performed an autopsy on the deceased, William Anderson. (RT 42.) He found 11 penetrating shotgun pellet wounds and two exit wounds. (RT 42-43.) The 11 penetrating wounds were in a fairly tight group, approximately two-and-a-half inches in diameter. (RT 47, 51.) There was no evidence that any powder was

** This is to the contrary of (A) (E) to object to Dr. Herrmann's ballistic opinion; (A) (E) to elicit PX testimony, by PH. were's he testified to the spread pattern being inconsistent to the markings of a saw-off ~~shot~~ shot-gun. (BM testimony).*

** (A) (E) to C.E. Dr. PH. concerning the effects of drugs (heroin, marijuana and alcohol) on a witnesses ability to perceive. (RT)*

*#) See #19
f BM Notes
iso PX pg 35-36
= CE (fear lie).
iso pg 33-34
bout where she
comes from ...
Tell police all
about A
w/ nothing about
"or (D) theory."*

Motion for New Trial

1 embedded in the skin. (RT 47.) The significance of these findings is "quite variable,"
 2 however, in the case of a shotgun. (RT 52.)
 3

4 After answering the prosecutor's question what he noted about the pattern of
 5 the 11 entry wounds, the doctor went on to state that he estimated that the weapon
 6 was fired from between 5 and 12 feet away. On cross-examination Dr. Herrmann
 7 stated that he has seen enough shotgun wounds to say that the distance from which the
 8 weapon was fired was within his expertise. (RT 50.) The spread of the pellets also
 9 depends on the choke of the gun, but there was no way Dr. Hermann could tell
 10 whether a choke was "used" or not. (RT 52-53.)

11 Defendant asserts that his counsel should have objected to the opinion as one
 12 that Dr. Herrmann had not been qualified to give, and asked that the testimony be
 13 stricken.

14 First, Dr. Hermann demonstrated no training or expertise that would allow him
 15 to testify about how much shotgun pellets "spread" in a given situation, particularly
 16 when there was no information available about the shotgun that was involved.
 17 Although he had been qualified to determine the cause of the death, there was no
 18 showing that he had special knowledge, training or experience to qualify him as an
 19 expert on ballistics or shotgun pellet patterns, let alone express an opinion relating to a
 20 shotgun of unknown characteristics. (See Evid. Code § 720.)

21 The fact that Dr. Herrmann testified he had seen other shotgun wounds was
 22 insufficient to establish his qualifications. (See People v. Fierro (1991) 1 Cal.4th 173, 224.)
 23 [retired deputy could testify about ballistics, but not as to effect of autopsy procedures
 24 on evidence of the bullets' trajectory.] Even if Dr. Hermann had seen many, many
 25 gunshot wounds, that fact would not have qualified him to express an opinion as to
 26 how far away a gun was when it was fired, unless he had witnessed the shootings or
 27 other ballistic tests themselves.³

28 ³ This is not a case where burns, smoke or powder on the skin were present.

We need to elaborate on
 the prejudice *Rev. v. Francisco*

V.

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE UNDER THE SIXTH AMENDMENT.

A criminal defendant has a constitutional right to *effective* assistance of counsel. (People v. Ledesma (1987) 43 Cal. 3d 171 215.) To prevail on a claim of ineffective counsel, a defendant must show first, that counsel's representation fell below an objective standard of reasonableness (Strickland v. Washington (1984) 466 U.S. 668, 688), and second, that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (Id. at 694.)

Both prongs of the Strickland test have been met in this case.

It is trial counsel's duty to investigate all defenses of fact and law which may be available. (People v. Mattson (1959) 51 Cal. 2d 777, 791; People v. Pope (1979) 23 Cal. 3d at 425.) Counsel should advise his client of his rights and take all necessary actions to protect them. If counsel's failure to perform these obligations results in the withdrawal of a crucial defense, then defendant has not had the assistance to which he is entitled under the Sixth Amendment. (People v. Pope, supra 23 Cal. 3d 412, 425.)

The actions of counsel in the case at bar did not give the defendant the standard of performance to which he was entitled.

When trial counsel has a tactical consideration in mind which explains the failure to raise a crucial defense, his tactics, even if unsuccessful, will usually not be considered incompetence. (People v. Pope, supra 23 Cal. 3d at 425.) However, the record itself may dispel the notion that counsel's shortcoming was the result of a tactical decision. For example, in People v. Stratton (1988) 205 Cal. App. 3d 87, the court held that the face of the record established that it was unreasonable to suggest that "tactics" could explain or justify counsel's failure to object to the potentially prejudicial circumstances surrounding appellant's arrest (holding a dummy hand grenade) which had nothing to do with the robbery with which he was charged. (Id. at p. 93, 94.)

1
2 Except for the errors of counsel in this case, taken cumulatively, there was a
3 substantial probability that the result of the proceeding would have been different.
4 (Strickland v. Washington, *supra* 466 U.S. at 694 ; Kimmelman v. Morrison (1986) 477
5 U.S. 365, 375.)

6 CONCLUSION

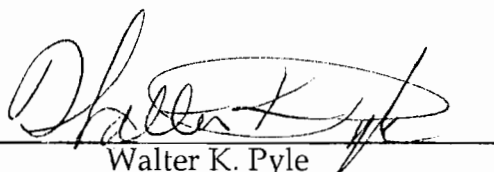
7 Mary Washington testified at trial to hearing several shots as they passed the
8 intersection (RT 531, 535.) Mary Loggins testified that after the shooting she saw
9 someone running down San Pablo, and his hands and arms were close to his body
10 like he may have had something under his jacket. (RT 514, 423.) This evidence was
11 consistent with the theory that Terry Dandy had a pistol and had fired it at defendant,
12 which would have supported a theory of self defense.

13 The record shows that defense counsel gave ineffective assistance by not
14 adequately investigating or preparing for a defense based on reasonable doubt. It is
15 clear from the nature of trial counsel's questions up until the court ruled at the end of
16 the State's case that defendant's prior testimony in his Oklahoma case could be
17 introduced to impeach him, that the defense theory was one of self-defense. (See, e.g.,
18 RT 194.) The record shows that counsel's ineffective assistance made a reasonable
19 doubt defense untenable under the circumstances. The decision to shift the defense to
20 that of reasonable doubt therefore could not have been an informed decision by
21 counsel.

22 Defendant asserts that counsel did not give him effective assistance, and there
23 is a substantial probability that affected the outcome of the case.

24 Defendant asks that this court grant him an opportunity to give testimony as
25 to the information he provided to counsel, and to examine counsel on similar matters.

26 At the close of the hearing the court should grant defendant's motion for a new
27 trial.

28 
Walter K. Pyle
Attorney for Defendant

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

CLERKS DOCKET AND MINUTES

000498

ST **KILGORE, IVAN** DEPT. **006** CRT. DATE/TIME **1/09/04 09:00**
Event NAME **KILGORE, IVAN DAWNELL** RPT. NO. **00-64017** DOCK NO. **141033**
PROC. **MNT** CEN. **0373689** PFN. **BBV550** A DAY **11/01/00** SJ DATE **7/19/04**
COUNTS PIC **00S00** AAG-OPD ACITY **OA**
CHARGES **1)F187 SC&USE PC 1 PR CONVICTED-J**

STAT SET BAIL **\$0.00** TOTAL DAYS IN CUSTODY: **1163**
BAIL STAT. BOND DT. BOND CO. DOB **05/05/75**
BAIL STAT. BOND DT. BOND CO. BAC
FINE/REST. DATE PAID REC. NO. **NORTH 1** TIME WAIVED **TWS**

PROCEEDING

DCCO:

JUDGE **KENNETH KINGSBURY** DEP. D.A. **DARRYL STALLWORTH**
DEP. CLERK **WANDA BOYNS** DEF. ATTY. **DEBORAH LEVY, WALTER RYLE** ☐ Not Present
REPORTER **GERALD DOHRMANN** OTHERS

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
☐ Stipulates to: lesser included / reasonably related offense of count(s) _____ to charge(s) _____
Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
Clauses: ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
Priors: ☐ Stricken ☐ Admitted ☐ Denied
Probation: ☐ Conditional Sentence: ☐ Granted for _____ years/months ☐ See attached conditions
☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____
☐ No contact with / not to annoy _____, directly or indirectly: stay at least _____ away
Additional order(s): _____
Petition/Motion: _____ ☐ Granted ☐ Denied ☐ Withdrawn
Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer ☐ _____
Restitution: ☐ Referred to _____ for Determination ☐ Ordered ☐ Reserved ☐ Modified
☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ Bench Warrant: ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WMM SW/EX: DEBORAH LEVY;

ont Date: **2-17-04** Time: **0900** Dept. **06** Proc.: **MNT** Date: _____ Time: _____ Dept. _____ Proc.: _____

C S Codes: _____

DOCKET
NAME

KILGORE, IVAN DAWNELL

CT. DATE **1/09/04**

DOCK NO.

141033

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

000499

CLERKS DOCKET AND MINUTES

DOCKET KILGORE, IVAN DEPT. 006 CRT. DATE/TIME 2/17/04 09:00
 EVENT NAME KILGORE, IVAN DAWNELL RPT. NO. 00-64017 DOCK NO. 141033
 PROC. MNT CEN. 0373689 PFN. BBV550 A DAY 11/01/00 SJ DATE 8/25/04
 COUNTS PIC 00S00 AAG-OPD ACITY OA
 CHARGES 1)F187 SC&USE PC 1 PR CONVICTED-J

STAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1199
 BAIL STAT. BOND DT. BOND CO. DOB 05/05/75
 BAIL STAT. BOND DT. BOND CO. BAC
 FINE/REST. DATE PAID REC. NO. NORTH 1 TIME WAIVED TWS

PROCEEDING

DCCO:

JUDGE KENNETH KINGSBURY DEP. D.A. DARRYL STALLWORTH
 DEP. CLERK WANDA BOYNS DEF. ATTY. DEBORAH LEVY, WALTER PYLE
 REPORTER GERALD DOHRMANN OTHERS ☐ Not Present

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
☐ Interpreter is present. Language spoken: _____
☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
☐ Stipulates to: lesser included / reasonably related offense of count(s) to charge(s)
 Time waived for: ☐ Preliminary Examination days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
☐ **Clauses:** ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
☐ **Priors:** ☐ Stricken ☐ Admitted ☐ Denied
☐ **Probation:** ☐ **Conditional Sentence:** ☐ Granted for years/months ☐ See attached conditions
☐ Revoked ☐ Restored ☐ Modified ☐ Extended to ☐ Continue on same terms and conditions ☐ Terminated
☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control
☐ No contact with / not to annoy, directly or indirectly: stay at least away
☐ Additional order(s):
☐ Petition/Motion ☐ Granted ☐ Denied ☐ Withdrawn
☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer ☐
Restitution: ☐ Referred to for Determination ☐ Ordered ☐ Reserved ☐ Modified
☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
☐ **Bench Warrant:** ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WWM

nt: Date: 2-19-04 Time: 0900 Dept. 06 Proc.: MNT Date: Time: Dept. Proc.:

Codes:

DOCKET NAME KILGORE, IVAN DAWNELL CT. DATE 2/17/04 DOCK NO. 141033

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

000500

KILGORE, IVAN DEPT. 006 CRT. DATE/TIME 2/19/04 09:00

EVENT NAME KILGORE, IVAN DAWNELL RPT. NO. 00-64017 DOCK NO. 141033

PROC. MNT CEN. 0373689 PFN. BBV550 A DAY 11/01/00 SJ DATE 8/27/04
COUNTS PIC 00S00 AAG-OPD ACITY OA

CHARGES 1) F187 SC&USE PC 1 PR CONVICTED-J

TAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1204
BAIL STAT. BOND DT. BOND CO. DOB 05/05/75
BAIL STAT. BOND DT. BOND CO. BAC
FINE/REST. DATE PAID REC. NO. NORTH 1 TIME WAIVED TWS

PROCEEDING

DCCD:

JUDGE KENNETH KINGSBURY

DEP. CLERK WANDA BOYNS

REPORTER GERALD DOHRMANN

DEP. D.A. DARRYL STALLWORTH

DEF. ATTY: DEBORAH LEVY WALTER PYLE

OTHERS Not Present

Defendant: ☒ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per

☐ Interpreter is present. Language spoken: _____

☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed

☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)

☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed

☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty

☐ Stipulates to: lesser included / reasonably related offense of count(s) _____ to charge(s) _____

Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn

☐ **Clauses:** ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only

☐ **Priors:** ☐ Stricken ☐ Admitted ☐ Denied

☐ **Probation:** ☐ Conditional Sentence: ☐ Granted for _____ years/months ☐ See attached conditions

☐ ☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated

☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation

☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____

☐ No contact with / not to annoy _____, directly or indirectly: stay at least _____ away

☐ Additional order(s): _____

☒ **Restitution:** ☐ Referred to _____ for Determination ☐ Ordered ☐ Reserved ☐ Modified

☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered

☐ **Bench Warrant:** ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WMM SW/EX: PHIL GREEN (SGT.), SGT. ENOCH OLIVAS,

MONTE BEERS, DEBORAH LEVY RESUMES,

W/EX IVAN KILGORE

nt: Date: 3-10-04 Time: 0900 Dept. 06 Proc.: MNT Date: _____ Time: _____ Dept. _____ Proc.: _____

Codes: ARGUMENT / DECISION

DOCKET NAME KILGORE, IVAN DAWNELL

CT. DATE 2/19/04 DOCK NO. 141033

RENE DAVIDSON COURTHOUSE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
CLERKS DOCKET AND MINUTES

C00502

ET KILGORE, IVAN

DEPT. 006

CRT. DATE/TIME 3/10/04 09:00

EVENT NAME KILGORE, IVAN DAWNELL

RPT. NO. 00-64017

DOCK NO. 141033

PROC. MNT CEN. 0373689 PFN. BBV550 A DAY 11/01/00 SJ DATE 9/16/04
COUNTS PIC 00S00 AAG-OPD ACITY DA

CHARGES 1) F187 SC&USE PC 1 PR CONVICTED-J

STAT SET BAIL \$0.00 TOTAL DAYS IN CUSTODY: 1224

BAIL STAT. BOND DT. BOND CO. DOB 05/05/75

BAIL STAT. BOND DT. BOND CO. BAC

FINE/REST. DATE PAID REC. NO. NORTH 1 TIME WAIVED TWS

PROCEEDING

DCCO:

JUDGE KENNETH KINGSBURY

DEP. D.A. DARYL STALLWORTH

DEP. CLERK WANDA BOYNS

DEF. ATTY. DEBORAH LEVY, WALTER PYLE

REPORTER GERALD DOHRMANN

OTHERS ☐ Not Present

- Defendant:** ☐ Present ☐ Not Present ☐ Excused ☒ In Custody ☐ Pro Per
- ☐ Interpreter _____ is present. Language spoken: _____
- ☐ Defendant duly arraigned/advised as to constitutional rights ☐ Defendant waives arraignment ☐ Waiver of Rights filed
- ☐ Defendant served: ☐ Complaint ☐ Discovery ☐ Petition ☐ Motion ☐ Protective Order (PC 136.2)
- ☐ Referred to Public Defender ☐ Public Defender files conflict ☐ Financially ineligible ☐ Private counsel appointed
- ☐ Plea Withdrawn ☐ Change of Plea ☐ Plea to count(s) _____ ☐ Not Guilty ☐ Guilty ☐ No Contest/Found Guilty
- ☐ Stipulates to: lesser included / reasonably related offense of count(s) _____ to charge(s) _____
- Time waived for: ☐ Preliminary Examination _____ days ☐ Trial ☐ Sentence ☐ Time not waived ☐ Time waiver withdrawn
- Clauses:** ☐ Stricken ☐ Admitted ☐ Sentencing Purposes Only
- Priors:** ☐ Stricken ☐ Admitted ☐ Denied
- Probation:** ☐ Conditional Sentence: ☐ Granted for _____ years/months ☐ See attached conditions
- ☐ Revoked ☐ Restored ☐ Modified ☐ Extended to _____ ☐ Continue on same terms and conditions ☐ Terminated
- ☐ Defendant admits probation violation ☐ Previous order revoking probation vacated, set aside, defendant restored to probation
- ☐ Submit to search and seizure of person, residence, vehicle or any property under defendant's control _____
- ☐ No contact with / not to annoy _____, directly or indirectly: stay at least _____ away
- ☐ Additional order(s): _____
- ☒ Petition/Motion FOR NEW TRIAL ☐ Granted ☒ Denied ☐ Withdrawn
- ☐ Referred to: ☐ Probation Dept. ☐ Financial Hearing Officer ☐ _____
- Restitution:** ☐ Referred to _____ for Determination ☐ Ordered ☐ Reserved ☐ Modified
- ☐ Bail Forfeited ☐ Bail Forfeiture Set Aside ☐ Bail Reinstated ☐ Bail Exonerated ☐ Summary Judgment Entered
- Bench Warrant:** ☐ Issued ☐ Withheld ☐ Withdrawn ☐ Bail Set at \$ _____ ☐ No Cite Release ☐ Night Service

2X CERT-CRT:WMM MATTER HAVING BEEN PREVIOUSLY SUBMITTED -

IS ARGUED AND SUBMITTED. ATTY DEBORAH LEVY IS RELIEVED FOR THE
PURPOSE OF SENTENCING AND WALTER PYLE WILL HANDLE THE R+S.

ont. Date: 4-9-04 Time: 0900 Dept. 06 Proc.: R+S Date: _____ Time: _____ Dept. _____ Proc.: _____

C 3 Codes: _____

DOCKET NAME KILGORE, IVAN DAWNELL

CT. DATE 3/10/04

DOCK NO. 141033

ORIGINAL

000503

Walter K. Pyle
(Bar No. 98213)
2039 Shattuck Avenue, Suite 202
Berkeley, CA 94704-1116
(510) 849-4424
Attorney for Defendant Ivan Kilgore

FILED
RE ALAMEDA COUNTY

04 APR -8 APR 85 2004

CLERK OF THE SUPERIOR COURT
By *Nancy J. Bays*
DEPUTY

IN THE SUPERIOR COURT OF ALAMEDA COUNTY, CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

IVAN KILGORE,

Defendant.

No. 141033

DEFENDANT'S
SENTENCING MEMO

Defendant Ivan Kilgore submits the following:

**OBJECTION TO CIRCUMSTANCES IN AGGRAVATION DESCRIBED IN
PROBATION REPORT**

Defendant objects on Fourteenth Amendment due process grounds to the following Circumstances in Aggravation described in the probation report:

Circumstance: "The crime involved great violence as the defendant shot and killed the victim in a drive by shooting." (Report, p. 4.)

Objection: This circumstances is necessarily included in the elements of the offense as charged, and the Legislature has presumably taken the elements of the offense into consideration in setting the applicable sentence. (People v. Clark (1992) 12 Cal. App. 4th 663, 666 ["A circumstance which is an element of the substantive offense cannot be used as a factor in aggravation."].)

000504

Circumstance: "The victim was particularly vulnerable as he was standing on the corner with his girlfriend and was not armed." (Report, p. 4.)

Objection: A victim standing on a street corner is not *particularly* vulnerable. (See People v. Fleetwood (1985) 171 Cal.App.3d 982, 987 (1985) ["Victims inside buildings are more vulnerable to felonious conduct than victims out of doors."].)

Circumstance: "The manner in which the crime was carried out indicates planning, sophistication or professionalism." (Report, p. 4.)

Objection: The facts of the case show no more planning, sophistication or professionalism than any other murder conviction based on a drive-by shooting.

OBJECTION TO IMPOSITION OF "USE" ENHANCEMENTS

Defendant further objects to the imposition of any enhancements relating to the Use of Firearm Clause (Pen. Code § 12022.53(d)) and Use of Firearm in Motor Vehicle Clause (Pen Code § 12022.55), on the grounds that those potential enhancements have already been taken into account by the Legislature in setting punishment for the "Special Circumstance" described in the information, and any further punishment duplicates punishment for the offense of murder and murder with special circumstances, in violation of due process of law under the Fourteenth Amendment..

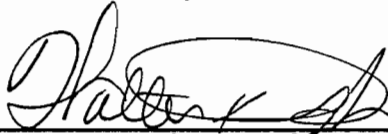
OBJECTION TO USE OF PRIOR CONVICTION

Defendant also requests that the court take judicial notice that his conviction for First Degree Manslaughter in Oklahoma was the equivalent of a conviction of involuntary manslaughter in the State of California, and does not constitute pleading or proof of a serious or violent felony under California law. Any use of this prior would violate the Due Process Clause of the Fourteenth Amendment, and defendant objects to the use of the prior conviction for any purpose.

**OBJECTION TO IMPOSITION OF RESTITUTION FOR LOST PROFITS OF
RELATIVES**

Defendant objects to the imposition of restitution based on the lost profits claimed for undelivered flowers. This claim includes both lost profits and the cost of goods sold, rather than an allocation of the profits attributable to the goods.

In addition, Penal Code § 1202.4 (f)(3)(E) provides that wages or profits lost by the victim are reimbursable, "and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution." The evidence showed that William Anderson was not a minor. The requested reimbursement for lost profits are not authorized by law, and defendant objects thereto.



Walter K. Pyle
Attorney for Defendant

000506

3-25-03

Judge Kingsberry

FILED
ALAMEDA COUNTY

APR 9 - 2004

CLERK OF THE SUPERIOR COURT

BY/And: J. Kingsberry DEPUTY

Hello. As an informal request to the court regarding my case, I request the opportunity to readdress and address, for a record, issues concerning inadequate and ineffective assistance of counsel.

Throughout the trial proceeding Ms. Levy has misrepresented the facts of the case. In a matter of language she used in the defense motion to exclude the Oklahoma prior for purposes of impeachment the proffer of the defendants anticipated testimony was incorrect. This mistake I informed her of when she initially filed the motion. Her response was it didn't matter. Well the language she used here later became a factor in your decision making. This was the point counsel then addressed the court concerning the mistake and submitted the correct version. And she only did this because I threatened to address the court myself concerning the issue. After she addresses the issue of the mistake she went on to comment to me that because of the change in the language at that point she felt you had become upset and because of this gave a prejudicial ruling. I strongly feel that had Mrs. Levy corrected the language initially when I first notified her of the mistake, your decision would have been uninfluenced.

Another issue of ineffectiveness on counsels behalf was during the cross examination, direct examination and arguments presented by her, she mistated the facts provided by the prosecutions witnesses by confusing what

000507

statements were stated by which witness. Thus having a nullifying affect in her attempts to impeach the witness with the use of an inconsistent statement. I attempted to have her correct herself by first pointing out to her the mistake, then requested her to convey the correct issue but she refused to do so.

As previously addressed in the Marsden hearing I felt Ms. Hevy would be ineffective and inadequate in her representation of the facts of this case. I would like to readdress those issues in the Marsden hearing that were denied because quote the presiding Judge said "that some of the issues were preconceived" therefore having no effect in his decision to grant the motion." Well those preconceived issues have become realities in the trial and sufficiently affected my right to have adequate and effective representation.

There are other issues of the same nature of the above mentioned, that for purposes of a record I wish to address the court.

Thank You

Ivan Kilgore

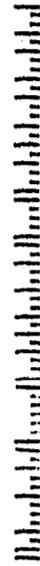
000508

Ivan Kilgore BBV550
5325 Broder Blv
Dublin CA 94568



Judge Kenneth Kingsbury
1225 Fallon St. Dept #6
Oakland CA 94612

54612+4272



1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF ALAMEDA
3 BEFORE THE HONORABLE KENNETH R. KINGSBURY, JUDGE

4 DEPARTMENT NO. 6

5 ---oOo---

FILED
ALAMEDA COUNTY

6 APR 9 - 2004

7 CLERK OF THE SUPERIOR COURT
By Wanda J. Byrne DEPUTY

8 THE PEOPLE OF THE STATE OF CALIFORNIA,

9 Plaintiff,

10 vs.

Nos. 141033

11 IVAN KILGORE,

12 Defendant.

13 ORIGINAL

14
15
16
17 COURTHOUSE, OAKLAND, ALAMEDA COUNTY, CALIFORNIA

18 FRIDAY, JUNE 27, 2003

19 ---oOo---

20 DEFENDANT'S MOTION FOR NEW TRIAL

21 ---oOo---

22
23 A P P E A R A N C E S

24 For the Plaintiff:

THOMAS J. ORLOFF
District Attorney

25 BY: DARRYL STALLWORTH, Deputy

26 For the Defendant:

27 DEBORAH LEVY, ESQ.
28

FRIDAY, JUNE 27, 2003

000510

---o0o---

- P R O C E E D I N G S -

---o0o---

DEFENDANT'S MOTION FOR NEW TRIAL

THE COURT: All right. In the matter of
People versus Kilgore, No. 141033.

The record should reflect that Mr. Stallworth is
here representing the People; Ms. Levy is here repre-
senting Mr. Kilgore; and Mr. Kilgore is present in
custody.

Just for the record, so it's completely clear,
before counsel arrived this morning, when I got here
this morning, Mr. Kilgore was here and neither counsel
was here. I had some brief unreported discussions with
Mr. Kilgore about the nature of what he was seeking.

The reason I did that is because, after reading
the transcript of the proceedings on June the 13th and
the motion that was filed by Ms. Levy, I got some
indication that maybe I had misconstrued what Mr.
Kilgore was seeking to do, and I wanted to clarify that,
and I believe we did, but perhaps not. We will discuss
that in a moment.

In addition to that, just so the record is
completely clear, that at Mr. Kilgore's request, I did
show him one appellate decision that he cited for me,
People vs. Dennis, in 177 Cal.App.3d; I also showed him
portions of People vs. Stewart, at 171 Cal.App.3d;

C00511

1 Evidence Code 958, which deals with a possible waiver of
2 attorney-client privilege, where in a criminal case
3 could be brought to bear if there was a claim of
4 ineffective assistance of counsel.

5 That was the sum and substance of it.

6 There was also some discussion about whether the
7 proceeding this morning would be, quote, unquote, in-
8 camera. My response was, "Depends."

9 There was also a question by Mr. Kilgore as to
10 whether or not things he said during a motion for new
11 trial alleging ineffective assistance of counsel, if
12 they did come to the fore at a formal hearing in that
13 regard, after a formal motion was made, would he have
14 any kind of immunity as to that, and I told Mr. Kilgore
15 I don't give advice.

16 I would be glad to share my books with you, but I
17 don't give legal advice. Mr. Kilgore that's basically
18 what I remember saying. Is there anything that you want
19 to add to that?

20 THE DEFENDANT: No.

21 THE COURT: All right. Basically I had
22 calendared this after our initial discussions last time
23 for a Marsden motion. But in looking at counsel's
24 motion again, which I did not have a great opportunity
25 to do the last hearing, and reading the transcript of
26 what pretty obvious to me Mr. Kilgore was trying to
27 communicate to the Court, I had some second thoughts
28 about what he was seeking to do, and I was looking at it